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No. 508

In the Supreme Court of the United States

OCTOBER TERM, 1930

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA, PETITIONER

v.

ERIE COAL & COKE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. —

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE for the Twenty-Third District of Pennsylvania, petitioner

v.

ERIE COAL & COKE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of D. B. Heiner, Collector of Internal Revenue, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above case on July 9, 1930 (R. 17), affirming the judgment of the United States District Court for the Western District of Pennsylvania (R. 13).

QUESTIONS PRESENTED

1. Whether the respondent is deprived of the right it would otherwise have had to recover taxes collected after the statutory period of limitations had expired, because it executed a bond conditioned upon the payment of the taxes in question.

2. If the respondent's action is not barred because of its execution of the bond, whether Sections 607, 611, and 612 of the Revenue Act of 1928 should be construed to prevent its recovery.

3. Whether the sections, if so construed, are constitutional.

STATEMENT

Respondent's tentative income and excess profits tax return for the calendar year 1917 was filed April 1, 1918, and its completed return was filed June 11, 1918. (R. 9.) The Federal tax liability reported thereon was assessed and paid. In March, 1921, the Commissioner of Internal Revenue assessed an additional tax against respondent for said year in the sum of $133,252.97. (R. 9.) This assessment was made within the period of limitations. On May 4, 1921, respondent filed a claim in abatement against this additional assessment, pursuant to which the assessment was reduced by the sum of $67,546.90 and the balance of the claim for abatement in the sum of $65,706.07 was rejected on March 23, 1926. (R. 9.) On April 20, 1926, pursuant to notice of distraint, petitioner collected from respondent the balance of $65,706.07. (R. 9.)

On April 27, 1927, respondent filed with petitioner a claim for refund of the additional tax collected. The Commissioner of Internal Revenue has not acted upon said claim for refund. (R. 9.)

When respondent filed its claim in abatement on May 4, 1921, the claim was accompanied by a bond conditioned upon the payment by respondent of any part of said additional tax found to be due by the Commissioner of Internal Revenue, which bond continued in force until the payment of the sum of $65,706.07, at which time another bond was substituted for it, which was conditioned upon the payment of interest which is not in issue herein. (R. 9.) The first bond recited that the taxpayer desired that collection of the amount assessed be deferred until final determination of the claim for abatement and that payment was not to be required until then. (R. 6–7.)

This suit was instituted on April 24, 1928, to recover the additional tax so paid. The Revenue Act of 1928 became law on May 29, 1928. The petitioner contended that the respondent's suit was barred because of its execution of the bond conditioned upon the payment of the tax, but the Circuit Court of Appeals did not mention this point in its opinion. The petitioner also contended that the provisions of Section 611 of the Revenue Act of 1928 (*infra,* pp. 8–9), effectively barred a recovery of the amount in controversy. Respondent contended and the Circuit Court of Appeals held

that Section 611 could not be applied for the reason that the amount in suit was paid subsequent to the enactment of Section 1106 (a) of the Revenue Act of 1926 (*infra*, p. 8), and at a time when by reason of the provisions of Section 1106 (a) respondent's liability for such additional tax had been extinguished.

Judgment for the respondent was entered by the District Court of the United States for the Western District of Pennsylvania for $65,706.07, with interest (R. 13), which judgment was affirmed by the United States Circuit Court of Appeals for the Third Circuit (R. 17).

SPECIFICATION OF ERRORS

I. The Circuit Court of Appeals erred in refusing to hold that recovery of the amount in suit in this case was barred because of the execution of a bond conditioned upon payment of the tax.

II. The Circuit Court of Appeals erred in holding that the provisions of Section 611 of the Revenue Act of 1928 did not preclude a refund or recovery of the amount in suit in this case.

III. The Circuit Court of Appeals erred in refusing to recognize the power of Congress to specify the conditions under which a recovery may be had of moneys paid to or collected by the United States as taxes.

IV. The Circuit Court of Appeals erred in failing to hold that Section 1106 (a) of the Revenue

Act of 1926 was retroactively repealed by Section 612 of the Revenue Act of 1928.

V. The Circuit Court of Appeals erred in affirming the judgment of the District Court in favor of the respondent.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals, in refusing to hold that recovery was barred because of the bond, is apparently in conflict with the decision of this Court in *United States* v. *John Barth Co.*, 279 U. S. 370. It is also in conflict with the decision of the Court of Claims in *Mascot Oil Co.* v. *United States*, 42 F. (2d) 309, now pending before this Court on a petition for certiorari which is not opposed by the Government. (No. 400, October Term, 1930.) (These cases are discussed on pp. 9–10, *infra*.)

2. A petition for a writ of certiorari has been filed in *United States* v. *Wyman, Partridge & Co.*, No. 416, October Term, 1930, involving substantially the same questions as those in the instant case which involve the above-mentioned sections of the Revenue Acts of 1926 and 1928.

3. The construction and application of Section 611 of the Revenue Act of 1928 is already before this Court in three cases in which certiorari has been granted on petitions of taxpayers which the Government did not oppose—*Graham* v. *Goodcell*, No. 36, October Term, 1930; *Magee* v. *United States*,

No. 65, October Term, 1930; *Oak Worsted Mills* v. *United States,* No. 104, October Term, 1930. Petitions for certiorari have also been filed by the taxpayers in several other cases which the Government has not opposed, and which are now pending before this Court. The facts in the instant case are similar to those in the above-mentioned cases, except that in the instant case the tax was paid after the enactment of Section 1106 (a) of the Revenue Act of 1926, while in the other cases the tax was paid before the enactment of that section.

4. The court below, in effect, held unconstitutional Section 612 of the Revenue Act of 1928, which, in plain language, repealed Section 1106 (a) of the Revenue Act of 1926 as of the date of its enactment. A final decision of this question is of great importance in securing the orderly administration of the taxing statutes. The question affects many pending assessments involving substantial sums of money.

5. The decision of the court below is, we submit, inconsistent with the decisions of this Court in *Rafferty* v. *Smith, Bell & Co.,* 257 U. S. 226; *United States* v. *Heinszen & Co.,* 206 U. S. 370; *Campbell* v. *Holt,* 115 U. S. 620.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

OCTOBER, 1930.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 8–12) is reported in 33 F. (2d) 135. The opinion of the Circuit Court of Appeals (R. 16) is reported in 42 F. (2d) 214.

JURISDICTION

The order of the Circuit Court of Appeals affirming the judgment of the District Court was entered on July 9, 1930. (R. 17.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the respondent is deprived of the right it would otherwise have had to recover taxes collected after the statutory period of limitations had expired, because it executed a bond conditioned upon the payment of the taxes in question.

2. If the respondent's action is not barred because of its execution of the bond, whether Sections 607, 611, and 612 of the Revenue Act of 1928 should be construed to prevent its recovery.

3. Whether the sections, if so construed, are constitutional.

STATUTES INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, 113, provides in part:

SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax.

(U. S. C. App., Title 26, Sec. 1249.)

The Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, provides in part:

SEC. 607. *Effect of expiration of period of limitation against United States.*—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

(U. S. C. Supp. III, Title 26, Sec. 2607.)

SEC. 611. *Collections stayed by claim in abatement.*—If any internal-revenue tax (or any interest, penalty, additional amount or addition to such tax) was, within the period of limitation properly applicable thereto,

assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

(U. S. C. Supp. III, Title 26, Sec. 2611.)

SEC. 612. *Repeal of section 1106 (a) of 1926 act.*—Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

(U. S. C. Supp. III, Title 26, Sec. 2612.)

STATEMENT

The facts are sufficiently stated in the petition.

ARGUMENT

We contend that the collection complained of by respondent was justified because of the bond which it executed at the time when it filed its claim in abatement. (R. 5.) The decision of the Circuit Court of Appeals on this point is apparently in conflict with that of this Court in *United States* v. *John Barth Co.*, 279 U. S. 370, where it was held that a suit by the United States upon a bond conditioned upon a payment of a tax was not barred by the statute of limitations relating to the collection of the tax. The decision of the court below is also apparently in conflict with that of the Court of Claims in

Mascot Oil Co. v. *United States,* 42 F. (2d) 309. In that case it appeared that the taxpayer had made a cash deposit in a bank in escrow to guarantee the payment of a tax, and the court, relying on the decision of this Court in the *Barth case,* held that the collection after the statutory period for the collection of the tax was justified by reason of the deposit. The *Mascot Oil case* is now pending before this Court on a petition for certiorari (No. 400, October Term, 1930) which is not opposed by the Government.

It is true that the bond involved in the *Barth case* was executed pursuant to the provisions of paragraph 14(a) of Section 234(a) of the Revenue Act of 1918, while the bond involved in the instant case was not required or prescribed by any particular statute. But the reasoning of this Court in the *Barth case* does not appear to depend upon the particular statutes in question and we submit that the *Barth case* and the instant case are not substantially distinguishable in this regard. The bond in the instant case appears to have been a valid obligation. If the taxpayer had refused to pay and if the Government could have succeeded in an action on the bond, it would seem clear that the taxpayer, by paying, could not acquire the right to recover the payment and avoid liability on the bond.

The respondent's position is supported by two decisions of the Board of Tax Appeals (*Shaffer* v. *Commissioner,* 12 B. T. A. 298, and *Gulf States*

Steel Co. v. *Commissioner*, 12 B. T. A. 1244), but these cases were decided by the Board before the decision of this Court in the *Barth case*.

If the taxpayer's action is not barred because of its execution of the bond, the questions involved in the instant case are substantially the same as those in *Wyman, Partridge & Co.* v. *United States,* decided by the Court of Claims, in which petition for certiorari has been filed in this Court, No. 416, October Term, 1930, and the same argument is applicable. The instant case differs from the *Wyman, Partridge & Co. case* only in the fact that the instant case was instituted by a suit in the District Court against a Collector of Internal Revenue, while the other case was a suit against the United States in the Court of Claims. We submit that this difference should not lead to a different decision.

If the respondent could not recover otherwise, the fact that the suit was brought prior to the enactment of the Revenue Act of 1928 does not give a right of recovery. A cause of action given by statute may be taken away at any time by a repeal of the Act creating it, and the result of such repeal is to abolish the right of action itself, even though it is then involved in suit. The bringing of suits vests in a party no right to a particular decision. *Flanigan* v. *Sierra County,* 196 U. S. 553, 560; *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226.

Respondent's right to recover the taxes in controversy is purely statutory. "Few governments have conceded such a right on any condition." *Cheatham* v. *United States*, 92 U. S. 85, 89. Even if respondent had been entitled to a recovery prior to the enactment of the Revenue Act of 1928 by reason of a favorable construction of Section 1106 (a) of the preceding Revenue Act, nevertheless, the enactment of Sections 607, 611, and 612 of the Revenue Act of 1928 was a proper withdrawal by the United States of its consent that the taxes might be recovered by reason of a statute of limitation. Ever since the decision of *Collector* v. *Hubbard*, 12 Wall. 1, it has been recognized that actions against Collectors to recover taxes paid are statutory proceedings. *Arnson* v. *Murphy*, 109 U. S. 238, 243; *Arnson* v. *Murphy*, 115 U. S. 579, 584; *Schoenfeld* v. *Hendricks*, 152 U. S. 691. The decision of the court below that this suit could be maintained notwithstanding the action of Congress in withdrawing its consent that such a statutory suit might be prosecuted is in conflict with the foregoing decisions and particularly with the declaration of this Court in *Collector* v. *Hubbard*, 12 Wall. 1, 14:

> Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law-maker, as the taxpayer can not have any vested right in the remedy granted by Congress for the correction of an error in taxation.

CONCLUSION

It is respectfully submitted that this petition should be granted.

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